Petition

81-515

No.

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In the Supreme Court of the United States

October Term, 1981

CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

STATE BOARD OF BUILDING STANDARDS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioners were denied due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution because Ohio Revised Code, Section 3781.10 (E) (6) is unconstitutionally vague.

2. Petitioners were denied due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution by the lack of standards used by the Respondent in its decertification proceedings.

LIST OF ALL THE PARTIES

Petitioners are the City of Eastlake, Ohio, a municipal corporation with a charter government and codified ordinances and its Building Department which enforces the Eastlake Building Code and is certified to enforce, within the City of Eastlake, the Ohio Building Code.

Respondent, Ohio Board of Building Standards, is a state agency created to promulgate building standards and regulate building trades. The Board certifies various entities to act as enforcement authorities for the Ohio Building Code. Cardinal Industries Inc. is the other named respondent and is a manufacturer of industrialized units. These units have received certificates of authorization to be built anywhere in Ohio from the Ohio Board of Building Standards. Cardinal Industries Inc. moved to have Petitioners certification removed because of petitioners refusal to grant a building permit to Cardinal Industries Inc. based on violations of the Eastlake Building Code.

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No.

In the Supreme Court of the United States

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CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

STATE BOARD OF BUILDING STANDARDS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioners, the City of Eastlake, Ohio, and the City Building Department of the City of Eastlake, respectfully pray that their Petition for a Writ of Certiorari be granted to review the final judgment and opinion of the Supreme Court of the State of Ohio, entered in this case on June 10, 1981.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Ohio, reported at 66 Ohio St. 2d 363 appears in the Appendix to this Petition, page (A1). The Tenth District Court of Appeals of Franklin County Opinion, which is not reported, appears in the Appendix hereto at page (A14). The Franklin County Court of Common Pleas Opinion, also not reported, appears in the Appendix, page (A32).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 10, 1981. This Petition for Certiorari was filed within ninety days.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Factual Background

The facts are not in dispute. Petitioner, the City of Eastlake is a municipal corporation which has enacted and enforces a building code within its jurisdiction. Petitioner, the Eastlake Building Department enforces the Eastlake building code and is certified to be an enforcement authority, within its jurisdiction of the Ohio Building Code. In the summer of 1977, Cardinal Industries applied to the Eastlake Building Department for a building permit to

construct industrialized unit multi-family dwellings. Along with its application for a building permit, Cardinal Industries submitted a Certificate of Authorization from the Ohio Board of Building Standards authorizing Respondent Cardinal Industries to build its dwelling units anywhere within Ohio.

Thereafter, Respondent Cardinal Industries was informed that its building plans violated several provisions of the Eastlake Building Code and it would be necessary to apply for variances. Contrary to this determination, Respondent, Cardinal Industries applied to the Ohio Board of Building Standards on April 9, 1978 to have Petitioner decertified as an enforcement authority of the Ohio Building Code pursuant to Ohio Revised Code, Section 3781.10 (E) (6).

Respondent, Ohio Board of Building Standards held a hearing as to the decertification of Petitioner and on May 11, 1979 issued a Rule decertifying Petitioners for failure to issue Respondent, Cardinal Industries a building permit. Respondent, Ohio Board of Building Standards held that the Ohio Building Code supersedes more restrictive local legislation and that Eastlake could not enforce its building code against Respondent, Cardinal Industries.

B. Proceedings Below

Petitioner sought review of this decertification in the Franklin County Court of Common Pleas, Ohio, claiming that Article XVIII, Section 3 of the Ohio Constitution permits Petitioner to enact local police regulation not in conflict with State law. In this regard, Ohio Revised Code, Section 3781 delineates that the Ohio Board of Building Standards may promulgate the lawful minimum standards of building requirements. Petitioner asserted that one,

Respondent, Ohio Board of Building Standards could not decertify Petitioner with no finding of incompetence as an enforcement authority, two, that the Respondent, Ohio Board of Building Standards had arbitrarily used that discretion vested in it by Ohio Revised Code, Section 3781.10 (E) (6) to decertify the Petitioner where this provision sets forth no standards to be applied to decertification.

The decision of the Court of Common Pleas found that there was a special legislative intent to preempt local regulation of industrialized units and that Respondent, Ohio Board of Building Standards had full authority pursuant to Ohio Revised Code; Section 3781.10 (E) (6) to decertify Petitioner. This was later sustained by the Tenth Appellate District Court of Appeals of Franklin County, Ohio, in which Petitioner raised the constitutional issue of denial of due process law, in that, the administrative hearing was adjourned as a show cause determination against the Petitioner whereat, the counsel representing, the interests of the Respondent, Ohio Board of Building Standards, before the Respondent at the hearing, also acted as its legal advisor before and during such proceedings. Further, this same counsel had issued a legal opinion to Respondent prior to the show cause citation recommending that Petitioner be decertified.

Thereafter, the Petitioner perfected appeal to the Supreme Court of the State of Ohio, and the Court in its Decision affirmed the appellate court concentrating on the legislative intent to give industrialized unit construction state-wide preemption from local regulation but failed to consider the constitutional issue in regard to due process of law.

Thereupon, appeal was perfected to this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The State Court wrongly determined that Respondent, Ohio Board of Building Standards, could lawfully revoke the Petitioner's certification pursuant to Ohio Revised Code, Section 3781.10 (E) (6) when this provision is unconstitutionally vague in its standards and constitutes a grant of legislative authority to Respondent.

Respondent, Ohio Board of Building Standards has determined that its enabling statutes provide for statewide preemption of any conflicting local regulation as it pertains to industrialized unit construction manufactured by Respondent, Cardinal Industries. Petitioner, the City of Eastlake maintained that the state code did not provide for preemptive treatment of industrialized unit construction and to this effect enforced its more restrictive building code upon Respondent, Cardinal Industries. In conjunction with its enforcement of a municipal building code, Petitioner is certified to enforce the Ohio Building Code within its jurisdiction. When Petitioner refused Cardinal Industries a building permit based on violations of the Eastlake Building Code, there was no opportunity for a judicial determination of the administrative disputes because Cardinal Industries filed instead, a petition to decertify the Petitioner, City of Eastlake as an enforcement authority of the Ohio Building Code pursuant to Ohio Revised Code, Section 3781.10 (E) (6).

Respondent, Ohio Board of Building Standards took the matter under advisement and issued a show cause citation to the Petitioner. The ability to be the enforcement authority for the Ohio Building Code within Petitioner's territorial jurisdiction is a great public benefit

to its citizens and flows from having a competent, knowledgeable, and diligent staff to service the community. To eliminate the certification of the Petitioner would create a bifurcated permit procedure on the state-local level and cause havoc with the ability to serve ongoing construction. The termination of such a public benefit cannot always be answered by the argument that it is a "privilege" and not a "right". *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The provisions of Ohio Revised Code, Section 3781.10 (E) (6) do not contain any standards for decertification. The determination to decertify is left to the unfettered discretion of the Respondent. Parties affected by the determination of an administrative body, are entitled to insist upon the compliance with the requirements of due process. *Shields v. Utah Idaho C.R. Co.*, 305 U.S. 177 (1938).

Statutes of this type encourage erratic, arbitrary and unfettered discretion in the hands of the State. In the case of *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110 (1972), Justice Douglas wrote:

> "Where as here, there are new standards governing our exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law."

Justice Douglas went on to say in (*Papachristou, supra*);

> "Living under a rule of law entails various suppositions, one of which is that (all persons) are entitled to be informed as to what the State commands or forbids."

This statute is unconstitutionally vague. The Petitioner's due process rights have been violated.

A licensing statute must have sufficient delineated standards so that the individuals affected by such are not left in doubt as to compliance with the statute. In order to avoid being unconstitutionally vague, the statute must be set forth in a reasonable guideline and not permit arbitrary determinations to be made. *Louisiana v. United States*, 380 U.S. 145 (1965); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

Regulation by an administrative agency is valid only when based on a legislative policy sufficiently defined by statute. When the delegation of authority to an administrative agency is not brought within these permissible limits an unconstitutional delegation of legislative authority exists. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934).

2. The State Court failed to determine that substantive due process had been denied Petitioner wherein the administrative agency undertook to decertify Petitioner based on its determination that Petitioner's validly enacted building code was void.

The fundamental requisites of due process before an administrative agency were delineated in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Parties that are affected by the determination of any agency have a right to a fair and impartial hearing whereat there is a right to confront and cross-examine witnesses, to appear with counsel. The hazard in appearing before an administrative agency in an adjudicatory matter is that the same officials have both made the determination to prosecute and are hearing the matter on its merits. In the case at bar, the determination to decertify the Petitioner was premised on Respondent's assertion that the state building code overrides

municipal building codes, therefore, Petitioner could not validly enforce its code where Respondent had already authorized the construction. Such a determination involves a legal determination that Petitioner's building code was invalid. This conflict was properly one for judicial determination and could not be maintained as the premise of a decertification proceeding. *Gibson v. Berrefull*, 411 U.S. 564 (1973); *Withrow v. Larkin*, 421 U.S. 35 (1975). Petitioner's right to due process of law was clearly violated by such administrative action.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided June 10, 1981)

No. 80-1094

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

IN RE DECERTIFICATION OF EASTLAKE:
CITY OF EASTLAKE,
Appellant,

vs.

OHIO BOARD OF BUILDING STANDARDS *et al.*,
Appellees.

APPEAL from the Court of Appeals for Franklin County.

During the summer of 1977, appellee Cardinal Industries (Cardinal) applied to the building commissioner for appellant, city of Eastlake (Eastlake), seeking the necessary building permits to construct within the city an apartment complex using industrialized units. These factory produced building units are governed by the state building code. Although the local building department is the local enforcement authority, the appellee Ohio Board of Building Standards (board) determines whether the particular manufactured unit complies with the performance standards of the state building code. The industrialized units Cardinal proposed to use in Eastlake were approved for use by the board. The Eastlake building commissioner, however, advised Cardinal that the units did not comply with the Eastlake building ordinance provisions for electrical

wiring, and denied Cardinal a building permit. The Board of Building Standards permitted use of a type of electrical wiring described as Romex wiring. Eastlake by ordinance, in effect, prohibited Romex wiring and required all electrical wiring to be encased in metallic cables.

On April 9, 1978, Cardinal petitioned the board to revoke certification of Eastlake as local enforcement authority for the state building code. The board held hearings on the petition for revocation. On May 11, 1979, the board ordered a rule to be filed revoking the certification of the Eastlake building department. This order was appealed to the Court of Common Pleas of Franklin County, which affirmed the board's action. On June 19, 1980, the Court of Appeals affirmed the judgment of the trial court.

This cause is now before this court pursuant to the allowance of a motion to certify the record.

CLIFFORD F. BROWN, J. The issue to be decided is whether approval of the use of an industrialized unit[1] by the board pursuant to R. C. Chapter 3781 precludes local authorities from imposing higher standards of construction on these units. After careful examination of the provisions of R. C. Chapters 3781 and 3791, we conclude that the General Assembly intended approval by the board of a particular industrialized unit to authorize use of the units throughout Ohio. To the extent the approved industrialized unit conflicts with local building ordinances, those ordinances are superseded and are invalid.

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1. The last paragraph of R. C. 3781.10 provides:

"As used in sections 3781.10 to 3781.18 and 3791.04 to 3791.07 of the Revised Code, 'industrialized unit' means an assembly of materials or products comprising all or part of a total structure which, when constructed, is self-sufficient or substantially self-sufficient, and when installed constitutes the structure or part of a structure, except for preparations for its placement."

The relationship between local building ordinances and the state building code is explained in R. C. 3781.01 as follows:

"Chapters 3781 and 3791 of the Revised Code do not prevent the legislative authority of a municipal corporation from making further and additional regulations, *not in conflict with* such chapters or with the rules and regulations of the board of building standards. Such chapters or the rules and regulations of the board of building standards do not modify or repeal any portion of any building code adopted by a municipal corporation and in force on September 13, 1911, which is *not in direct conflict with* such chapters or with such rules and regulations." (Emphasis added.)

The principle that local ordinances may not conflict with the state building code or rules of the board is repeated in R. C. 3781.11 as follows:

"The rules and regulations of the board of building standards shall:

"* * *

"(D) Encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material, and techniques, including methods employed to produce industrialized units.

"The rules and regulations of the board of building standards shall supersede and govern any order, standard, rule or regulation of * * * [other state authorities] and of counties and townships, in all cases where such orders, standards, rules or regulations are *in conflict with* the rules and regulations of the board of building standards. [Emphasis added.]

"The construction, alteration, erection, and repair of buildings including industrialized units, and the materials and devices of any kind used in connection therewith and the heating and ventilating thereof and the plumbing and electric wiring therein shall conform to the statutes of this state or the rules and regulations adopted and promulgated by the board of building standards, and to provisions of local ordinances *not inconsistent therewith.* * * *" (Emphasis added.)

The procedure that builders of industrialized units must follow to gain local approval for construction is delineated in R. C. 3791.04 as follows:

"Before entering into contract for or beginning the construction, erection, or manufacture of any building to which section 3781.06 of the Revised Code is applicable, including all industrialized units, the owner shall, in addition to any other submission of plans or drawings, specifications, and data required by law, submit the plans or drawings, specifications, and data prepared for the * * * [particular industrialized unit] which * * * shall indicate thereon the portions that have been approved pursuant to section 3781.12 of the Revised Code, for which no further approval shall be required, to the municipal * * * building department having jurisdiction if such department has been certified as provided in division (E) of section 3781.10 of the Revised Code * * *."

Cardinal petitioned and obtained approval of the use of this particular industrialized unit from the board, pursuant to R. C. 3781.12, which in part provides:

"* * * The issuance of the authorization for the use of the materials or assemblages described in the petition shall constitute approval for their use anywhere in Ohio."

Upon compliance with the procedure outlined in R. C. 3791.04, Cardinal was entitled to approval of the use of this industrialized unit in Eastlake. Failure of the building commissioner for Eastlake to approve this use gave Cardinal standing as a "person affected" pursuant to R. C. 3781.10(E)(6)[2] to petition the board for revocation of certification of Eastlake as local enforcement authority of the state building code. At hearings conducted August 18 and September 29, 1978, Eastlake had an opportunity to present evidence showing why it should not be decertified. Although the final order decertifying Eastlake took the form of a rule, the procedure followed by the board was an adjudicatory hearing conforming to R. C. Chapter 119, and authorized in R. C. 3781.101.[3]

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2. R. C. 3781.10(E)(6) provides:

"Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards by any person affected by such enforcement or approval of plans, or by said board on its own motion. Hearings shall be held and appeals permitted on any such proceedings for certification or for revocation or suspension of certification in the same manner as provided in section 3781.101 of the Revised Code for other proceedings of the board of building standards."

3. R. C. 3781.101, in part, provides:

"The provisions of sections 119.03 and 119.11 of the Revised Code in particular, and the applicable provisions of Chapter 119 of the Revised Code in general, shall govern the proceedings of the board of building standards in adopting, amending, or rescinding rules and regulations pursuant to section 3781.10 of the Revised Code, and the proceedings under sections 3781.12, 3781.13 and 3781.14 of the Revised Code, in addition to the procedural provisions of such sections.

"* * *

"Notwithstanding the provisions of section 119.11 of the Revised Code, in any proceedings commenced under section[s] 3781.10, 3781.12, 3781.13 and 3781.14 of the Revised Code, the jurisdiction of the court of common pleas of Franklin county shall not be confined to the record as certified to it by the board, but shall receive such additional evidence as it shall permit any party to offer; and the court shall not affirm the order or rule of the board unless the preponderance of the evidence before it supports the reasonableness and lawfulness of such order or rule."

Eastlake contends that the state building code provides *minimum* building standards for industrialized units, and does not preclude local authorities from imposing higher standards of construction. Although R. C. Chapter 3781 in several sections provides that the standards therein are the lawful minimum for public buildings and industrialized units, the thrust of these sections dealing with industrialized units is to encourage their use throughout the state. To that end the relevant statutes in R. C. Chapters 3781 and 3791, establish a one-step approval process for industrialized units, through the board, which constitutes "approval for their use anywhere in Ohio." See R. C. 3781.12. To allow local authorities to impose higher or different standards on these units would defeat the avowed purpose of the state building code to encourage standardization of construction "methods employed to produce industrialized units." See R. C. 3781.11(D). Standardization of industrialized units, as described in R. C. Chapter 3781, necessarily precludes imposition of local requirements which conflict with the practices approved for statewide use. This is not the case with public buildings not using factory produced modules as the basic unit of construction. In those cases, the statutes do provide minimum standards only, and local authorities may impose higher standards consistent with local ordinances. With industrialized units, however, a standard of construction is necessary to effectuate the legislative intent to encourage use of this type of construction throughout Ohio.

Eastlake's action in imposing more restrictive standards of construction on the industrialized units by ordinance than those mandated by the Ohio Building Code is in conflict with the general laws, and gave the board just cause for revoking its certification as local enforcement authority of the state code.

The conclusion we reach is consistent with application of the home rule powers of municipalities expressed in Section 3, Article XVIII of the Ohio Constitution, which provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations *as are not in conflict with general laws.*" (Emphasis added.)

R. C. Chapters 3781 and 3791 are general laws of the state and constitute police regulations. *Bogen v. Clemmer* (1932), 125 Ohio St. 186; *Niehaus v. State, ex rel. Bd. of Edn.* (1924), 111 Ohio St. 47. A statute which sets forth police, sanitary and similar regulations uniformly statewide is a general law for purposes of Section 3, Article XVIII of the Ohio Constitution. *West Jefferson v. Robinson* (1965), 1 Ohio St. 2d 113, paragraph three of the syllabus. The next question is whether there is a "conflict" between general laws (R. C. Chapters 3781 and 3791) and the Eastlake building ordinances. Under the following well accepted legal principles and precedents we hold that there is such a "conflict."

In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute prohibits and vice versa. A city ordinance cannot forbid and prohibit what a statute permits and licenses. *State, ex rel. Cities Service v. Orteca* (1980), 63 Ohio St. 2d 295, 299; *Lorain v. Tomasic* (1979), 59 Ohio St. 2d 1, 4; *Anderson v. Brown* (1968), 13 Ohio St. 2d 53, 58; *Auxter v. Toledo* (1962), 173 Ohio St. 444, 447; *State, ex rel. McElroy v. Akron* (1962), 173 Ohio St. 189; *Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus.

As expressed in R. C. Chapters 3781 and 3791, the state has manifested a statewide concern for uniformity in building industrialized units. When the state by comprehensive statutory plan has imposed regulations statewide where there is a genuine statewide concern for uniformity in building industrialized units, any ordinance which differs from the statutes by imposing more restrictive requirements is in "conflict" therewith and is *ipso facto* invalid. *State, ex rel. Klapp v. Dayton P. & L. Co.* (1967), 10 Ohio St. 2d 14; *State, ex rel. Arey v. Sherrill* (1944), 142 Ohio St. 574; *Cleveland Tel. Co. v. Cleveland* (1918), 98 Ohio St. 358.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, *C.J.*, P. BROWN and SWEENEY, *JJ.*, concur.
HOLMES, *J.*, concurs in the judgment.
W. BROWN, and LOCHER, *JJ.*, dissent.

HOLMES, *J.*, concurring. I must concur in the judgment in that, as stated by the majority, the General Assembly has made a legislative policy decision in favor of statewide uniformity in the building of these so-called industrialized units. R. C. Chapters 3781 and 3791 are general laws by nature, and local laws in conflict therewith must give way.

Being strongly in support of home rule powers of municipalities in the exercise of their police powers, granted by Section 3, Article XVIII of the Ohio Constitution, I would have entertained serious doubt as to such legislative intrusion upon local authority, had I been in a legislative capacity. However, I must judicially review these sections in light of the constitutional provisions, and

conclude that the state was within its power in enacting such general laws.

WILLIAM B. BROWN, *J.*, dissenting. R. C. 3781.10(A) provides that rules formulated and adopted by the Ohio Board of Building Standards "* * * shall be the lawful *minimum* requirements specified for such buildings *or industrialized units* * * *." (Emphasis added.) R. C. 3781.10 makes it plain to me the General Assembly could not have intended for the Ohio Basic Building Code (OBBC) to supersede any municipal ordinance which imposes more restrictive standards of construction. This view is reflected in the OBBC itself, which defines "Conflict with OBBC" as "* * * legislation, or a rule, or a condition which is at variance with OBBC to the extent or in a manner that such legislation, rule, or condition permits or constitutes a provision for safety or sanitation which would be, or is *less safe or sanitary* than is required under OBBC." (Emphasis added.) Ohio Adm. Code 4101: 2-1-02.

LOCHER, *J.*, dissenting. At the threshold of our concern herein is the ultimate question of whether there is a "conflict" between the statute and ordinance. More narrowly framed for our consideration herein, the issue is whether a statute regulating over a certain matter automatically preempts and overrides a municipality from regulating on the same subject matter.

The answer is unequivocably "no."

An ordinance is not *ipso facto* invalid if it regulates the same subject matter as does a statute, if there is not a "head-on collision" between the legislative enactments. An ordinance which imposes more restrictive requirements than does a statute is not in conflict and thereby can and should be upheld as co-extensive with the necessities and safeguards of the public interest.

The majority properly recites the time-tested rule espoused in *Struthers v. Sokol* (1923), 108 Ohio St. 263, for determining whether a "conflict" does exist,[4] but then, upon the strength of *State, ex rel. Klapp, v. Dayton P. & L. Co.* (1967), 10 Ohio St. 2d 14, assumes that a more restrictive ordinance *ipso facto* constitutes a "conflict."

Initially, a review of *Sokol, supra,* is not only interesting but also illuminating. *Sokol's* rationale and eventual determination do not parallel the majority's rationale herein.

In *Sokol,* certain city ordinances make some acts crimes that were not crimes by statute, and, in one instance, the ordinance imposed a greater penalty than that imposed by the statute concerning the same offense.

The court found no technical conflict and upheld the ordinances, even though the ordinances regulated the same subject matter, and even, in one instance, imposed a more stringent penalty than its statutory counterpart.[5]

The majority's reliance on *Klapp; State, ex rel. Arey, v. Sherrill* (1944), 142 Ohio St. 574; and *Cleveland Tel. Co. v. Cleveland* (1918), 98 Ohio St. 358, for the assertion that "any ordinance which differs from * * * statutes * * * im-

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4. Paragraph two of the syllabus in *Sokol, supra,* reads as follows:

"In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."

5. Paragraph three of the syllabus in *Sokol, supra,* reads as follows:

"A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance."

posing more restrictive requirements is in 'conflict' therewith and is *ipso facto* invalid" is a misapplication of the law.

In the above-cited cases, a "conflict," commonly referred to as a "head-on collision," between the city and state legislative enactments concerning general laws was clearly established, invalidating the ordinance thereby. There is no mention in these cases that a more restrictive requirement imposed by ordinance is invalid if a statute also legislates over that same subject matter. The majority is reading too much into those cases which, in my opinion, are already questionable in their result.[6]

An ordinance can be in conflict with a statute if it is not strictly local in nature or, more importantly, to our consideration herein, if the ordinance is more restrictive than the statute. The grant of home rule powers by virtue of Section 3, Article XVIII of the Ohio Constitution allows the imposition of stricter regulations and should not be held *ipso facto* invalid merely when the ordinance and statute legislate over the same subject matter. In order to obviate an ordinance which regulates over the same subject matter as does a statute, a "head-on collision" must be found. See: *United States Fidelity & Guaranty Co. v. Guenther* (1930), 281 U.S. 34; *Heidle v. Baldwin* (1928), 118 Ohio St. 375; *Matthews v. Russell* (1949), 87 Ohio

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6. A vital and integral component of the Ohio constitutional amendments of 1912 were the home rule powers. In the era immediately following 1912, Judge Wanamaker wrote long and vigorous opinions concerning the ramifications of the recently enacted home rule powers.

Unfortunately, his sound reasoning and logical approach in the area of home rule were not always adhered to by a majority of the court. It is my understanding and belief that had his interpretation and rationale been followed more often, we would not find ourselves vacillating on the scope of home rule powers. Judge Wanamaker's dissenting opinion in *Cleveland Tel. Co. v. Cleveland, supra*, at pages 387-428, most clearly illuminates my understanding of home rule powers.

App. 443; *Coshocton v. Saba* (1936), 55 Ohio App. 40; *Leipsic v. Folk* (1931), 38 Ohio App. 177; *Columbus v. Green* (1923), 1 Ohio Law Abs. 534; *State, ex rel. Haley, v. Troutdale* (1978), 281 Ore. 203, 576 P. 2d 1238; Accord, 14 Western Reserve L. Rev. 786, at page 793; and 29 Ohio St. L. J. 29, at page 38.

In 3 Ohio Northern L. Rev., the author gives a learned opinion as to the issue at bar. At pages 680 and 681, he aptly comments:

"* * * [A]bsent denial by the state legislature, the [constitutional] committee had intended that municipal regulations which were more strict than those of the state would be valid, but not those which were less severe. This explanation was repeated often enough, gained sufficient adherents, and was varied enough in its phrasing that little doubt could remain that the convention thoroughly understood at least what 'conflict' was intended to mean. A municipality could go 'further' than state regulations, but not 'fall short' of them. A municipality could 'add' to state regulations, but it could not 'lessen' state power or 'destroy' or 'weaken' a statute or 'breakdown' a general law. A municipality could make a state regulation 'stronger' but not 'weaker.'"

To further buttress my opinion that no conflict does exist merely upon municipal legislation in the same area, analysis of the Ohio Board of Building Codes (OBBC) is necessary to determine the scope of a "conflict." Ohio Adm. Code 4101:2-1-02 defines "Conflict with OBBC" as:

"* * * [L]egislation, or a rule, or a condition which is at variance with OBBC to the extent or in a manner that such legislation, rule, or condition permits or constitutes a provision for safety or sanitation *which would be, or is less safe or sanitary than is required under OBBC.*" (Emphasis added.)

The majority opinion readily admits that R. C. Chapter 3781, in several sections, provides that the safety standards therein are the lawful minimum for public building and industrialized units.[7]

Had the General Assembly intended to totally preempt and thereby proscribe a statewide concern for the use of the industrialized units at issue here it should have utilized an express statutory prohibition against any other measures. *Cleveland v. Raffa* (1968), 13 Ohio St. 2d 112, and *Columbus Legal Amusement Assn. v. Columbus* (1947), 50 Ohio Law Abs. 353, 358. Instead, the General Assembly merely set forth minimum safety requirements which other political subdivisions could adopt or make more stringent.

R. C. 3781.01, in fact, expressly states that additional regulation by a municipal corporation in this area is permissible. In pertinent part, it reads:

"Chapters 3781 and 3791 of the Revised Code do not prevent the legislative authority of a municipal corporation from *making further and additional* regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards." (Emphasis added.)

Therefore, I would reverse the judgment of the Court of Appeals, in that the statute and state building code at issue prescribe only the lawful minimum standards and that there was no intent to preempt local regulations which impose more stringent safety requirements.

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7. See R. C. 3781.10(A) which provides that regulations formulated and adopted by the Ohio Board of Building Standards "shall be the *lawful minimum* requirements for * * * industrialized units."

OPINION OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Rendered June 19, 1980)

No. 79AP-795

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

IN RE: Matter of Decertification of the City of Eastlake
(*Appellant-Appellant*)

(Ohio Board of Building Standards, et al.)

McCormac, *J.*

The City of Eastlake has appealed the judgment of the Franklin County Court of Common Pleas which affirmed the order of the Ohio Board of Building Standards (Board) decertifying Eastlake as the Board's agent to enforce the Ohio Building Code within the city. The following assignments of error are asserted:

1. "The court below erred in determining that there exists an intention to preempt local regulation as to prefabricated industrialized units by various amendments to Ohio Revised Code Sections 3781.11, 3781.12 and 3791.04 within Am. Sub. H.B. 709."

2. "The court below erred in affirming a decertification of a municipal enforcement authority of the Ohio Building Code based on the substantive ground that Appellant may not enforce its own building code."

3. "The court below erred in determining that the procedure by which Appellant was decertified as an enforcement authority was proper."

4. "The court below failed to consider the issues presented for review by Appellant as to Cardinal Industries standing to petition for the decertification of Appellant and its abuse of the administrative process."

The City of Eastlake is a charter municipality which was certified by the Board, pursuant to R. C. 3781.10, to exercise enforcement of the Ohio Building Code within the city. In addition, Eastlake has adopted and enforces its own municipal building code. In June, 1977, Cardinal Industries, a manufacturer of industrialized units licensed by the Board, applied to the Eastlake Building Department for a building permit for the construction of certain industrialized units to be located in Eastlake. The permit was denied on the basis that the units of Cardinal Industries did not comply with the electrical requirements of Eastlake's building code. Cardinal Industries was advised that it must apply to the Eastlake Board of Zoning Appeals for a variance.

In April, 1978, Cardinal Industries filed a petition with the Board to revoke Eastlake's certification as an enforcement authority for the Ohio Building Code, alleging that Eastlake's action was contrary to law and that Eastlake's building code was in direct conflict with R. C. 3781.12. The Board issued notice to Eastlake on July 7, 1978, to appear and show cause why the certification of its building department should not be revoked. Following a hearing, the Board revoked Eastlake's certification pursuant to R. C. 3781.10(E)(6), which provides that the Board shall:

"(E) Certify municipal, township, and county building departments to exercise enforcement authority

and to accept and approve plans and specifications, and make inspections pursuant to sections 3781.03 and 3791.04 of the Revised Code.

"* * *

"(6) Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards by any person affected by such enforcement or approval of plans, or by said board on its own motion. Hearings shall be held and appeals permitted on any such proceedings for certification or for revocation or suspension of certification in the same manner as provided in section 3781.101 [3781.10.1] of the Revised Code for other proceedings of the board of building standards."

The Common Pleas Court found the order of the Board to be lawful, reasonable and in accordance with law.

In its first assignment of error, Eastlake asserts that the court erred in finding a legislative intention to preempt local regulation of prefabricated industrialized units and argues that a charter municipality is authorized by law to enact ordinances which apply higher standards of safety or more restrictive requirements than imposed by the state with respect to such units.

Authorization for municipalities to adopt local building codes is given by Section 3, Article XVIII of the Ohio Constitution, which provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. * * *."

Pursuant to this provision, Eastlake adopted a building code which contains requirements with respect to the construction of industrialized units. Such units are also governed by the Ohio Building Code and regulations established by the Ohio Board of Building Standards under which manufacturers of industrialized units, who comply therewith, are authorized by the Board to construct such units.

Revised Code sections pertinent to such authorization include R. C. 3781.12, which provides that manufacturers may petition for approval, and states in part:

> "* * * The issuance of the authorization for the use of the materials or assemblages described in the [owner's] petition shall constitute approval for their use anywhere in Ohio. * * *."

Also relevant is R. C. 3791.04, which provides:

> "Before entering into contract for or beginning * * * erection, or manufacture of any building to which section 3781.06 of the Revised Code is applicable, including all industrialized units, the owner thereof shall, in addition to any other submission * * *, submit the plans or drawings, specifications * * *, which plans or drawings, and specifications shall indicate thereon the portions that have been approved pursuant to section 3781.12 of the Revised Code, for which no further approval shall be required, to the municipal * * * building department having jurisdiction if such department has been certified as provided in division (E) of section 3781.10 of the Revised Code, * * *."

As indicated earlier, Cardinal Industries received authorization from the Board for the construction of its industrialized units but was denied a building permit by appellant for non-compliance with Eastlake's building code,

which contained requirements more stringent than those in the Ohio Building Code. Eastlake contends that it is empowered, both by the Ohio Constitution and by statute, to enact and enforce regulations regarding industrialized unit construction which contain higher standards of safety or more restrictive requirements than the minimum state requirement, citing in support, Section 3, Article XVIII of the Ohio Constitution, *supra*, and R. C. 3781.01 *et seq.*, and R. C. 3791.04, which provide in material part:

R. C. 3781.01—

"Chapters 3781. and 3791. of the Revised Code do not prevent the legislative authority of a municipal corporation from making further and additional regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards. * * *."

R. C. 3781.10(A)—

"The board of building standards shall:

"(A) Formulate and adopt regulations governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, including land area incidental thereto, the construction of industrialized units, * * *. Such rules and regulations shall be the lawful minimum requirements specified for such buildings or industrialized units, * * * and the board shall on its own motion, or on application made under sections 3781.12 and 3781.13 of the Revised Code, formulate, propose, adopt, modify, amend, or repeal such rules and regulations to the extent necessary or desirable to effectuate the purposes of sections 3781.06 to 3781.18, inclusive, of the Revised Code;"

R. C. 3791.04—

> "Notwithstanding any procedures established by the board, the agency having jurisdiction, if it objects to any portion of the plans or specifications, may upon the request of the owner or representative of the owner issue conditional approval to proceed with construction up to the point where there is objection * * *."

Appellant argues that the above laws authorize municipalities to override the Ohio Building Code by enactment of local building ordinances. However, to adopt that construction would eliminate the wording "not in conflict with" which is found in R. C. 3781.01 and Section 3, Article XVIII of the Ohio Constitution.

Although municipalities are empowered to adopt local police, sanitary and similar regulations, their power is limited to enactment of regulations as are not in conflict with general laws. R. C. Chapter 3781. and Chapter 3791. are general laws of the state and the Ohio Building Code is a police regulation. *Niehaus v. State, ex rel. Bd. of Edn.* (1924), 111 Ohio St. 47; *Bogen v. Clemmer* (1932), 125 Ohio St. 186. Thus, a municipality is without power to adopt any building regulation which is in conflict with R. C. Chapter 3781. and Chapter 3791.

In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the law forbids and prohibits, and vice versa. *Lorain v. Tomasic* (1979), 59 Ohio St. 2d 1. In those cases where, in the exercise of its police power, a municipality has attempted to forbid an act which the state has permitted or licensed, the Supreme Court has applied the principle enunciated in *Lorain, supra.* The instant case falls within that category.

R. C. 3791.04 specifically provides that "approval of plans and specifications, including inspection of the industrialized units, under this section is a 'license' * * *."

The only permissible conclusion is that appellant's regulation, which imposes more restrictive requirements on industrialized units than those mandated by the Ohio Building Code, is in conflict with a general law. Appellant has attempted to prohibit that which the state specifically permits.

Although the trial court referred to the doctrine of preemption, it is obvious that the trial court used the term only in the context of conflict with the general law of the state rather than preemption *per se*, as the trial court referred to matters where the local authorities can still regulate industrialized units.

The first assignment of error is overruled.

In its second assignment of error, appellant asserts that the court erred in affirming the Board's decertification order, claiming that the order was based on the substantive ground that appellant may not enforce its own building code.

Pursuant to R. C. 3781.10, the Board is authorized to certify political subdivisions to enforce the provisions of R. C. Chapter 3781. and Chapter 3791. Likewise, the Board has authority to revoke or suspend certification, under R. C. 3781.10(E)(6). Appellant's refusal to issue a building permit to Cardinal for the installation of industrialized units constructed and approved in accordance with R. C. 3781.12 constitutes a violation of appellant's enforcement duty and certification authority. The Board's action in decertifying appellant, on the basis of appellant's failure to properly perform its enforcement duty, a function of certification, was within the Board's discretion and ju-

risdiction. Contrary to appellant's assertion, the Board's order does not constitute a reversal of appellant's decision to deny the building permit nor does it rest upon the ground that appellant may not lawfully enforce its own building code. The Board's order rests upon its authority to revoke certification granted by R. C. 3781.10(E)(6); the reason for revocation lies within the bounds of such authority.

Appellant also argues that R. C. 3781.10(E) does not contain standards for the Board to apply in decertification decisions, such determinations being entirely within the Board's discretion and as such an unlawful delegation of legislative authority. The Ohio Building Code is a police measure and the discretionary authority of the Board must be measured by the terms set forth in *Matz v. The J.L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, in which the court stated:

> "7. As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations."

However, the constitutional issue need not be decided, for the Board clearly has authority to revoke appellant's certification when appellant acted outside its delegated authority in refusing to apply the general law of the state.

Appellant's second assignment of error is overruled.

For its third assignment of error, appellant asserts that the court erred in determining that the Board's procedure in decertifying appellant was proper. Appellant argues that the Board proceeded against appellant pursuant to rule-making procedures rather than through adjudication proceedings.

The record indicates that the Board issued a show cause order to appellant on July 7, 1978, and provided an opportunity for hearing and presentation of evidence.

A hearing was held on August 18, 1978, followed by a continuation hearing on September 29, 1978. Both parties appeared and were given the opportunity to present evidence. The Board then notified appellant by letter dated May 16, 1979, of the Board's decision of May 11, 1979, revoking appellant's certification. The letter also contained notice of appellant's right to appeal and the procedure therefor.

Also, on May 11, 1979, the Board filed Rule 4101:2-95-32, effective May 25, 1979, which reads:

"4101:2-95-32 REVOCATION OF THE CERTIFICATION OF THE CITY OF EASTLAKE, OHIO BUILDING DEPARTMENT.

"The Board of Building Standards, Ohio Department of Industrial Relations, pursuant to division (E) of Section 3781.10 of the Revised Code, orders the revocation of the certification of the city of Eastlake, Ohio Building Department to exercise enforcement authority, to accept and approve plans and specifications, and make inspections pursuant to sections 3781.03 and 3791.04 of the Revised Code, for Chapters 4101:2-51, 4101:2-53, 4101:2-55, 4101:2-57, 4101:2-59, 4101:2-61, 4101:2-63, 4101:2-65, 4101:2-67, 4101:2-69, 4101:2-71, 4101:2-73, and 4101:2-75 of the Administrative Code."

Appellant claims that the promulgation of Rule 4101: 2-95-32 was improper under the holding of this court in *In re Application of Blue Cross* (1973), 40 Ohio App. 2d 285, which prohibits rule making by adjudication. However, the record shows that the Board followed proper adjudicatory procedure in reaching its decertification decision. The incorporation of its order of revocation into an administrative rule does not constitute rule making by adjudication in the sense of *Blue Cross, supra.* The revocation was complete without the adoption of a rule. Appellant was not denied procedural due process and the Board acted in accordance with procedures appropriate to a quasi-judicial proceeding.

Appellant's third assignment of error is overruled.

Lastly, appellant argues that the trial court failed to consider the issues presented for review as to Cardinal's standing to petition for appellant's decertification and Cardinal's abuse of the administrative process.

Appellant claims that Cardinal was not compliant with the Ohio Building Code, specifically the Model Code for Energy Conservation, when it filed its petition in April, 1978, and that Cardinal, therefore, cannot be a "person affected" under R. C. 3781.01(E)(6) dealing with decertification.

This assignment of error is not well taken for the following reasons: (1) appellant's refusal to issue a building permit was not based upon Cardinal's alleged failure to comply with the Energy Code; (2) although Cardinal's plans as approved by the Board did not refer to the Energy Code (which was not then in effect), the record indicates that, insofar as the materials and physical construction of the industrialized units, Cardinal was in compliance with the requirements of the Energy Code even before its adoption although the approved plans on their face

did not show compliance; and (3) under the provisions of R. C. 3781.10(E), revocation of certification may be initiated not only by a party adversely affected but also by the Board on its own motion.

Thus, any error by the Board, based on Cardinal's alleged "lack of standing," is not prejudicial.

Appellant also contends that Cardinal's mandatory route of redress, upon denial of a local building permit, was through an appeal to the Eastlake Board of Zoning Appeals for a variance. As indicated earlier in this opinion, appellant lacked authority to adopt and enforce a building code regulation in conflict with the Ohio Building Code. It follows that its Board of Zoning Appeals had no jurisdiction over the matter and that Cardinal followed the proper procedure in filing its petition with the State Board.

Appellant's fourth assignment of error is overruled.

Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

MOYER, J., concurs.
WHITESIDE, J., dissents.

WHITESIDE, J., dissenting.

Being unable to concur in the conclusions of the majority, I must respectfully dissent.

At the outset, there is a jurisdictional problem in that the notice of appeal purports to appeal from an order of the Ohio Board of Building Standards rendered May 11, 1979. The notice of appeal states that the appeal "is pursuant to the provisions of the Ohio Revised Code Sec-

tion 3781.101 et seq., 119.11 et seq. and any other pertinent sections of the Ohio Revised Code." Attached to the notice of appeal is a copy of the order reading as follows:

> "The Board of Building Standards, of the Ohio Department of Industrial Relations, on this 11th day of May, 1979, made the following order:
>
> "It is ordered that the following rule for the Revocation of the certification of the city of Eastlake, Ohio building department, attached hereto and by reference made a part hereof, be filed with the Secretary of State, and the Legislative Reference Bureau; and by rule number listed below:
>
> 4101:2-95-32
>
> "It is further ordered that said adopted rule be filed by the Executive Secretary of the Board with the Secretary of State, and Legislative Reference Bureau for an effective date of 25th day of May, 1979.
>
> "It is further ordered that the Executive Secretary of the Board of Building Standards make reasonable effort to notify those affected by this rule in compliance with the laws of Ohio.
>
> "By order of the Board of Building Standards."

Following the declaration in *Rankin-Thoman, Inc. v. Caldwell* (1975), 42 Ohio St. 2d 436 that it was unconstitutional, R.C. 119.11, referred to in the notice of appeal, was repealed effective September 30, 1976. The order appealed from was promulgated pursuant to R.C. 3781.10 which provides in pertinent part that:

> "The board of building standards shall:
>
> "* * *
>
> "(E) Certify municipal, township, and county building departments to exercise enforcement author-

ity and to accept and approve plans and specifications, and make inspections pursuant to sections 3781.03 and 3791.04 of the Revised Code.

"* * *

"(6) Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards by any person affected by such enforcement or approval of plans, or by said board on its own motion. Hearings shall be held and appeals permitted on any such proceedings for certification or for revocation or suspension of certification in the same manner as provided in section 3781.101 [3781.-10.1] of the Revised Code for other proceedings of the board of building standards.

"* * *."

R.C. 3781.01 pertains to exercise of rule-making authority by the Board of Building Standards and provides in part as follows:

"Chapters 3781. and 3791. of the Revised Code do not prevent the legislative authority of a municipal corporation from making further and additional regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards. Such chapters or the rules and regulations of the board of building standards do not modify or repeal any portion of any building code adopted by a municipal corporation and in force on September 13, 1911, which is not in direct conflict with such chapters or with such rules and regulations."

From the foregoing, it is apparent that the Board of Building Standards is primarily a rule-making authority, and does not ordinarily make adjudications, the Board

of Building Appeals established by R.C. 3781.19, being the agency charged with the responsibility of making adjudications which are subject to appeal pursuant to R.C. 119.12.

Not only is the primary function of the Board of Building Standards that of rule making, but in this instance, it purported to adopt a rule, not make an adjudication. The appellee herein contends that somehow an "order" of May 16, 1979 constitutes an adjudication. Rather, such "order" is not an order of the Board of Building Standards, but instead, is apparently the notification sent by the executive secretary of the Board in accordance with the May 11, 1979 order of the Board of Building Standards that the executive secretary "make reasonable effort to notify those affected by this rule." In any event, the May 16 letter does not constitute an order of the Board of Building Standards, but rather only notice given by the executive secretary of the order adopted May 11, 1979, to which the letter refers, and further states: "Please find enclosed a copy of the Order of the Board of Building Standards and newly adopted rule 4101:2-95-32."

In short, the record reflects no adjudication order from which an appeal may properly be perfected pursuant to R.C. 119.12. Since R.C. 119.11, upon which the notice of appeal indicates the appeal is predicated, has been repealed, no appeal thereunder would be possible even if the section had not been declared to be unconstitutional.

For this reason, the jurisdiction of the Court of Common Pleas was not properly invoked by the notice of appeal, the appellant having no right of appeal from the order appealed from. For this reason, I would reverse the judgment of the Court of Common Pleas and remand

to that court with instructions to dismiss the appeal for lack of jurisdiction.

Unfortunately, the "rule" adopted by the Board of Building Standards by its May 11, 1979 order, itself reads like an order, and expressly states, *inter alia*, that the Board "orders the revocation of the certification of the city of Eastlake, Ohio building department to exercise enforcement authority." If there be an adjudication involved herein, it is this "rule," not the order adopting the "rule."

Even assuming that the Court of Common Pleas had jurisdiction over this appeal, the issues determined herein are not properly before us. An appeal of this nature, is not a substitute for an appeal by intervening appellee Cardinal Industries, from the order of the Eastlake Building Department denying a permit to Cardinal Industries, which could properly be appealable only pursuant to R.C. 3781.19, nor a substitute for a conceivable action for declaratory judgment by Cardinal Industries. Accordingly, the issues raised by the first assignment of error as to the effect of present R.C. 3781.11, 3781.12 and 3791.04, are not properly before us. Further, the only conceivable issue that could be before us is whether or not the "rule" decertifying Eastlake, is contrary to law, since the sole basis thereof appears to be whether Eastlake may enforce its own building code, which allegedly is in conflict with R.C. 3781.12. In this regard, R.C. 3781.10(E) provides in pertinent part as follows:

"• • •

"(1) Enforcement authority for approval of plans and specifications may be exercised, and plans and specifications approved on behalf of a municipal corporation, township, or county, by any of the following who meet the qualifications established by the board of building standards:

"(a) Officers or employees of the municipal corporation, township, or county;

"(b) Persons, or employees of firms or corporations, when such persons, firms, or corporations are under contract to furnish architectural or engineering services to the municipal corporation, township, or county, and such authority is exercised pursuant to such contract;

"(c) Officers or employees of any other municipal corporation, township, county, health district, or other political subdivision, or person or employees of firms or corporations under contract with the same pursuant to division (E)(1)(b) of this section, when such other municipal corporation, township, county, health district, or other political subdivision is under contract to furnish architectural or engineering services to the municipal corporation, township, or county, and such authority is exercised pursuant to such contract.

"* * *

"(3) Municipal, township, and county building departments shall have jurisdiction within the meaning of sections 3781.03 and 3791.04 of the Revised Code, only with respect to the types of buildings and subject matters as to which they have been certified under this section and as to which such certification remains in effect.

"(4) Such certification shall be upon application by the municipal corporation, the board of township trustees, or the board of county commissioners and approval of such application by the board of building standards. Such application shall set forth:

"(a) The types of building occupancies as to which the certification is requested;

"(b) The number and qualifications of the staff composing the building department;

"(c) The names, addresses, and qualifications of persons, firms, or corporations contracting to furnish work or services pursuant to divisions (E)(1)(b) and (2)(b) of this section;

"(d) The names of other municipal corporations, townships, counties, health districts, or other political subdivisions contracting to furnish work or services pursuant to divisions (E)(1)(c) and (2)(b) of this section;

"(e) The proposed budget for the operation of such department.

"(5) The board of building standards shall adopt regulations governing:

"(a) The qualifications of building department personnel and of those employees of persons, firms, or corporations exercising authority pursuant to divisions (E)(1) and (2) of this section. Any employee of the department or person who contracts for services with the department is disqualified from performing services for the department when the same would require him to pass upon, inspect, or otherwise exercise any authority given by the Ohio building code over any labor, material, or equipment furnished by him for the construction, alteration, or maintenance of a building or the preparation of working drawings or specifications for work within the jurisdictional area of the department. The department shall provide other similarly qualified personnel to enforce the requirements of the Ohio building code as it pertains to such work.

"(b) The minimum services to be provided by a certified building department.

"* * *."

A fair reading of these sections indicates that the predicate for certification, or decertification, of a municipal corporation is the qualifications of its personnel to perform the duties involved, which qualifications are to be established by rule adopted by the Board of Building Standards. The only additional matter is the size of the staff and the budget for the operation of the municipal department. Nowhere in R.C. 3781.10(E) is there any provision for denial, revocation, or suspension of certification, because a municipal corporation has adopted a building code which the Board of Building Standards feels to be in conflict with the State law, even though the municipal corporation has enforced its own ordinance, prior to any determination, even by the Board of Building Standards, that its ordinance which it is enforcing is in conflict with State law. However, the statutory scheme is such that the determination of whether or not there be such a conflict is in the first instance vested in the Board of Building Appeals, pursuant to R.C. 3781.19, and from there in the courts. For this reason, and to this extent, the second, third and fourth assignments of error are well taken. Likewise, the first assignment of error is well taken for the reason that the Court of Common Pleas erred in determining an issue not properly before it in this proceeding. Accordingly, assuming the Court of Common Pleas had jurisdiction over this appeal, I would sustain all four assignments of error, and reverse the judgment, and remand to that court with instructions to reverse the order of the Board of Building Standards.

However, for the reasons stated above, I would find that the Court of Common Pleas had no jurisdiction in this appeal, reverse its order for that reason, and remand with instructions to dismiss the appeal.

OPINION OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

(Filed October 1, 1979)

Case No. 79-CV-05-2505

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

IN RE: MATTER OF DECERTIFICATION OF EASTLAKE, CITY OF EASTLAKE,
Appellant,

vs.

OHIO BOARD OF BUILDING STANDARDS, *et al.*,
Appellees.

DECISION

Rendered this 1st day of October, 1979. REDA, J.

This matter comes before the Court on an Revised Code 119.12 appeal from a decision of the Appellee Ohio Board of Building Standards which retracted the certification issued to the Division of Inspection of the Appellant City of Eastlake. This certification in effect delegates some of the Board's power to a local government unit such as a city, allowing it to inspect and enforce state building and safety codes. The substantive ground upon which this decertification was made was the asserted failure of the City of Eastlake to comply with state law concerning industrialized units (prefabricated homes and apartments).

The key issue in this case is indeed, the compliance or non-compliance of Eastlake with state law. Stripped to the essentials, this case turns on whether the General Assembly, in enacting Amended Substitute House Bill 709 in November of 1969, intended to preempt local regulation of building and construction as applied to prefabricated industrialized units. On a close reading of Am. Sub. H.B. 709, the Court concludes that the General Assembly did intend to eliminate local inspection of industrialized units by various amendments to Revised Code Sections 3781.11, 3781.12 and 3791.04. The entire statutory scheme exhibits an overall plan to unify the market for prefabricated housing by providing for one centralized, comprehensive inspection at the state level so that economics of scale, with resultant cost savings, can be achieved by mass production of pre-fab units. The Court is not deciding this case based on a policy argument. No conclusion other than state preemption of local regulation is possible in light of such clear statutory language as that in Revised Code 3781.12, which states:

> "The issuance of the authorization for the use of the materials or assemblages described in the petition shall constitute approval for their use *anywhere in Ohio.*" (Emphasis added).

The City of Eastlake argues that its constitutional home rule powers provide the basis for its inspection authority and that the General Assembly or the Board cannot abridge these powers. However the very clause of the Ohio Constitution which creates home rule powers has the limitation that the powers must be exercised with ordinances "as are not in conflict with general laws". Ohio Const. Article XVIII, Section 3. The Court concludes that the statutory amendments concerning industrialized units are intended by the General Assembly to have statewide af-

fect and thereby supersede inconsistent, non-uniform local regulation. These statutes are general laws and the Eastlake ordinances are in conflict with them under the tests of *Lorain v. Tomasic*, 59 O. St. 2d. 1 (1979), *Struthers v. Sokol*, 108 O. St. 263 (1923), *Auxter v. Toledo*, 173 O. St. 444 (1962) and related cases. Accordingly the city ordinances must give way to the general law of the state.

It must be emphasized that Eastlake is only preempted from inspection and approval as to industrialized units for building code violations. The actual location, and density of the units would of course be subject to local zoning control as the State has not adopted any type of comprehensive statewide land use plan which would constitute a general law.

The "remedy" in this case for the violation by Eastlake of the state statutes is its decertification as an authorized inspection agency. Eastlake has challenged various facets of the administrative procedure used to reach that result. The Court cannot find error in the procedure used, either as to the composition of the Board or the role of the assistant attorney general in advising the Board and later presenting the case.

Therefore, the Court finds that the decision appealed from is supported by reliable, probative and substantial evidence and is in accordance with law. The decision of the Board is AFFIRMED. Counsel for appellees shall prepare an appropriate entry.

FRANK A. REDA, *Judge*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

(Filed October 16, 1979)

Case No. 79CV-05-2505

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

IN RE: MATTER OF DECERTIFICATION
OF EASTLAKE, CITY OF EASTLAKE,
Appellant,

vs.

OHIO BOARD OF BUILDING STANDARDS, *et al.*,
Appellees.

JOURNAL ENTRY

This cause came on to be heard on the appeal of the City of Eastlake pursuant to the provisions of R.C. 3781.101 and R.C. 119.12 from the order of the Ohio Board of Building Standards, entered on May 11, 1979 which, pursuant to the authority vested in it by R.C. 3781.10(E)(6), revoked the Certification of the Building Department of the City of Eastlake to exercise enforcement authority and accept and approve plans and specifications, and make inspections pursuant to R.C. 3781.03 and R.C. 3791.04.

This cause was submitted to this Court upon the record of the proceedings in the case in the Ohio Board of Building Standards, the additional evidence submitted to this Court, pursuant to permission of this Court, at the hearing on July 20, 1979, the briefs of appellant, City of Eastlake,

the briefs of appellee, Ohio Board of Building Standards, and the briefs of Cardinal Industries, Inc., which by order of this Court was permitted to intervene as an additional appellee herein.

On consideration thereof and in accordance with the Decision of this Court of October 1, 1979, which is incorporated herein by reference, this Court finds that the order of the Ohio Board of Building Standards of May 11, 1979 is supported by reliable, probative and substantial evidence and is in accordance with law. This Court further finds that the preponderance of the evidence before it supports the reasonableness and lawfulness of such order.

It is, therefore, ORDERED, ADJUDGED and DECREED that the order of the Board of Building Standards of May 11, 1979 be and the same hereby is AFFIRMED; that the stay order heretofore issued on May 24, 1979 be and the same hereby is DISSOLVED; and that FINAL JUDGMENT is rendered accordingly and the appeal herein is DISMISSED, at the costs of appellant, the City of Eastlake.

FRANK R. REDA, *Judge*

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR REHEARING AND MOTION TO STAY

(Filed July 29, 1981)

No. 80-1094

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

IN RE DECERTIFICATION OF EASTLAKE:
CITY OF EASTLAKE,
Appellant,

vs.

OHIO BOARD OF BUILDING STANDARDS *et al.*,
Appellees.

REHEARING AND MOTION FOR STAY

It is ordered by the court that rehearing and motion for stay in this case be denied.

OHIO CONSTITUTION

Art. XVIII, § 3.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.

OHIO REVISED CODE

§ 3781.10 Duties.

The board of building standards shall:

(A) Formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, including land area incidental thereto, the construction of industrialized units, the installation of equipment, and the standards or requirements for materials to be used in connection therewith. Such standards shall relate to the conservation of energy in and to the safety and sanitation of such buildings. The rules shall be the lawful minimum requirements specified for such buildings or industrialized units, except that no rule which specifies a higher requirement than is imposed by any section of the Revised Code shall be enforceable; the rules shall be acceptable as complete lawful alternatives to the requirements specified for such buildings or industrialized units in any section of the Revised Code; and the board shall on its own motion, or on application made under sections 3781.12 and 3781.13 of the Revised Code, formulate, propose, adopt, modify, amend, or repeal the rules to the extent necessary or desirable to effectuate the purposes of sections 3781.06 to 3781.18 of the Revised Code.

(B) Formulate and report to the general assembly such amendments in existing statutes relating to the purposes declared in section 3781.06 of the Revised Code as public health and safety and the development of the arts require and such additional legislation as it recommends with a view to carrying out fully, in statutory form, the purposes declared in such section; and prepare and submit

to the general assembly a summary report of the number, nature, and disposition of the petitions filed under sections 3781.13 and 3781.14 of the Revised Code;

(C) Determine by rule, on its own motion or on application made under sections 3781.12 and 3781.13 of the Revised Code, and after thorough testing and evaluation that any particular fixture, device, material, process of manufacture, manufactured unit or component, method of manufacture, system, or method of construction, complies with performance standards adopted pursuant to section 3781.11 of the Revised Code, having regard to its adaptability for safe and sanitary erection, use, or construction, to that described in any section of the Revised Code, whereever the use of a fixture, device, material, method of manufacture, system, or method of construction which is described in such section of the Revised Code, is permitted by law; and on like application amend or annul any such rule, or issue an authorization for the use of a new material or manufactured unit; and no department, officer, board, or commission of the state other than the board of building standards or the board of building appeals shall permit the use of any fixture, device, material, method of manufacture, newly designed product, system, or method of construction at variance with what is described in any rule adopted or authorization issued by the board of building standards or in any section of the Revised Code. Nothing in this section shall be construed as requiring approval, by rule, of plans for an industrialized unit that conforms with the rules adopted by the board of building standards pursuant to section 3781.11 of the Revised Code.

(D) Recommend to the industrial commission, the public health council, or any other department, officer, board, or commission of the state, and to legislative authorities and building departments of counties, townships, and municipal corporations, the making, amending, fixing,

or ordaining by such appropriate action as such state, county, township, or municipal authorities may be empowered by law or the constitution to take, of such rules, codes, or standards as shall tend to carry out the purposes declared in section 3781.06 of the Revised Code, with a view to securing uniformity of state administrative ruling; and local legislation and administrative action;

(E) Certify municipal, township, and county building departments to exercise enforcement authority and to accept and approve plans and specifications, and make inspections pursuant to sections 3781.03 and 3791.04 of the Revised Code.

(1) Enforcement authority for approval of plans and specifications may be exercised, and plans and specifications approved on behalf of a municipal corporation, township, or county, by any of the following who meet the qualifications established by the board of building standards:

(a) Officers or employees of the municipal corporation, township, or county;

(b) Persons, or employees of firms or corporations, when such persons, firms, or corporations are under contract to furnish architectural or engineering services to the municipal corporation, township, or county, and such authority is exercised pursuant to such contract;

(c) Officers or employees of any other municipal corporation, township, county, health district, or other political subdivision, or persons or employees of firms or corporations under contract with the same pursuant to division (E) (1) (b) of this section, when such other municipal corporation, township, county, health district, or other political subdivision is under contract to furnish architectural or engineering services to the municipal corporation, township, or county, and such authority is exercised pursuant to such contract.

(2) Enforcement authority for inspections may be exercised, and inspections made on behalf of a municipal corporation, township, or county, by any of the following who meet the qualifications established by the board of building standards:

(a) Officers or employees of the municipal corporation, township, or county;

(b) Persons, or employees of firms or corporations, when such persons, firms, or corporations are under contract to furnish inspection services to the municipal corporation, township, or county, and such authority is exercised pursuant to such contract;

(c) Officers or employees of any other municipal corporation, township, county, health district, or other political subdivision under contract to furnish inspection services to the municipal corporation, township, or county, when such authority is exercised pursuant to such contract.

(3) Municipal, township, and county building departments shall have jurisdiction within the meaning of sections 3781.03 and 3791.04 of the Revised Code, only with respect to the types of buildings and subject matters as to which they have been certified under this section and as to which such certification remains in effect.

(4) Such certification shall be upon application by the municipal corporation, the board of township trustees, or the board of county commissioners and approval of such application by the board of building standards. Such application shall set forth:

(a) The types of building occupancies as to which the certification is requested;

(b) The number and qualifications of the staff composing the building department;

(c) The names, addresses, and qualifications of persons, firms, or corporations contracting to furnish work or services pursuant to divisions (E) (1) (b) and (2) (b) of this section;

(d) The names of other municipal corporations, townships, counties, health districts, or other political subdivisions contracting to furnish work or services pursuant to divisions (E) (1) (c) and (2) (b) of this section;

(e) The proposed budget for the operation of such department.

(5) The board of building standards shall adopt regulations governing:

(a) The qualifications of building department personnel and of those employees of persons, firms, or corporations exercising authority pursuant to divisions (E) (1) and (2) of this section. Any employee of the department or person who contracts for services with the department is disqualified from performing services for the department when the same would require him to pass upon, inspect, or otherwise exercise any authority given by the Ohio building code over any labor, material, or equipment furnished by him for the construction, alteration, or maintenance of a building or the preparation of working drawings or specifications for work within the jurisdictional area of the department. The department shall provide other similarly qualified personnel to enforce the requirements of the Ohio building code as it pertains to such work.

(b) The minimum services to be provided by a certified building department.

(6) Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards by any person affected by such enforcement

or approval of plans, or by said board on its own motion. Hearings shall be held and appeals permitted on any such proceedings for certification or for revocation or suspension of certification in the same manner as provided in section 3781.101 [3781.10.1] of the Revised Code for other proceedings of the board of building standards.

(7) Upon certification, and until such authority is revoked, county and township building departments shall enforce such rules over those occupancies listed in the application without regard to limitation upon the authority of boards of county commissioners under Chapter 307. of the Revised Code or boards of township trustees under Chapter 505. of the Revised Code.

(F) Conduct such hearings, in addition to those required by sections 3781.06 to 3781.18 and 3791.04 of the Revised Code, and make such investigations and tests, and require from other state departments, officers, boards, and commissions such information as the board deems necessary or desirable in order to assist it in the discharge of any duty or in the exercise of any power mentioned in this section or in sections 3781.06 to 3781.18 and 3791.04 of the Revised Code;

(G) Formulate rules and establish reasonable fees for the review of all applications submitted where the applicant applies for authority to use a new material, assembly, or product of a manufacturing process. The fee established shall bear some reasonable relationship to the cost of such review or testing of the materials, assembly, or products submitted and notification of approval or disapproval as provided in section 3781.12 of the Revised Code.

(H) Compile and publish, in the form of a model code, rules pertaining to one-family, two-family, and three-family dwelling houses which any municipal corporation, township, or county may incorporate into its building code.

As used in sections 3781.10 to 3781.18 and 3791.04 to 3791.07 of the Revised Code, "industrialized unit" means an assembly of materials or products comprising all or part of a total structure which, when constructed, is self-sufficient or substantially self-sufficient, and when installed constitutes the structure or part of a structure, except for preparations for its placement.

Opposition

CASE NO. 81-515

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

City of Eastlake, et al.,

Petitioners

v.

State Board of Building Standards, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CASE NO. 81-515

IN THE
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City of Eastlake, et al.,
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State Board of Building Standards, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

1. Petitioners, an Ohio municipality and its building department, have asserted herein that they were denied due process of law as guaranteed by the Fifth and Fourteenth Amendments. However, in a long line of cases, beginning with **City of Pawhuska v. Pawhuska Oil and Gas Co.**, 250 U.S. 394 (1919), this Court has held with respect at least to the exercise of governmental authority a municipal corporation has no privileges or immunities under the Federal Constitution which it may invoke in opposition to a statute of the state.

2. The Supreme Court of Ohio held that the provisions of Chapters 3781 and 3791, Ohio Revised Code, are general laws of the state and constitute police regulations. The Supreme Court held that the City of Eastlake was not empowered under the "home rule"

provisions of Article XVIII, Section 3, of the Ohio Constitution to enact local ordinances in conflict with these general laws. This holding is purely a question of Ohio law, with no federal questions raised or addressed. The Ohio Supreme Court did not decide and was not asked to decide whether any of the provisions of Chapters 3781 and 3791, Ohio Revised Code, were repugnant to the Constitution, treaties or laws of the United States or whether Petitioner possesses any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States. Accordingly, this Court lacks jurisdiction herein under the provisions of 28 U.S.C. Section 1257(3).

3. The provisions of Rule 17 of the Rules of this Court clearly specify the considerations governing review on certiorari. None of the considerations therein set forth are present, since the Ohio Supreme Court did not decide a federal question at all, and did not decide a question of federal law in conflict with the decision of another state court of last resort, a federal court of appeals or the decisions of this Court.

4. Petitioners have the burden of showing that the federal question they attempt to raise herein was adequately raised in the state courts. **Street v. New York**, 394 U.S. 576 (1969). Rule 21(1)(h) of this Court's 1980 Rules specifies the manner in which such burden must be met in the petition for certiorari. Petitioners have made no attempt to comply with this Rule; indeed, compliance is impossible since the federal issues herein asserted were not raised in the state courts. These issues were not raised before the Ohio courts and cannot be decided at this stage of the proceedings by this Court. **Cardinale v. Louisiana**, 394 U.S. 437 (1969).

5. The due process claims advanced by Petitioners are totally without merit in any event, even had these claims been properly raised before the state courts by

persons within the purview of the Fifth and Fourteenth Amendments. The cases relied upon by Petitioners stand simply for the proposition that due process requires at least an opportunity to be heard. The City of Eastlake was accorded such "due process", both by virtue of its right to and actual appearance with counsel at an evidentiary hearing before the Ohio Board of Building Standards and by its right to and actual appeal of the order of the Board to the Common Pleas Court of Franklin County, Ohio and thence to the Ohio Court of Appeals, and finally, to the Ohio Supreme Court.

ARGUMENT

INTRODUCTION

Respondents, the Ohio Board of Building Standards ("the Board") and Cardinal Industries, Inc. ("Cardinal") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Ohio in this case. That opinion is reported in 66 Ohio St.2d 363, and appears in the appendix of the petition (p. A1).

In its statement of the "Questions Presented for Review" (p. 1), Petitioners (an Ohio municipality and its building department) assert that they were "denied due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution" (1) "because Ohio Revised Code, Section 3781.10(E)(6) is unconstitutionally vague," and (2) "by lack of standards used by the Respondent in its decertification proceedings." These two claims are combined in the headnote at p. 5 of the petition wherein it is claimed that the State Court "wrongly determined" that the Board could lawfully revoke Eastlake's certification under Section 3781.10(E)(6) of the Ohio Revised Code "when this provision is unconstitutionally vague in its standards and constitutes a grant of legislative authority to" the Board.

A separate claim, not referred to at p. 1, also is advanced at pp. 7 and 8 to the effect that the "State Court failed to determine that substantive due process had been denied Petitioner wherein the administrative agency undertook to decertify Petitioner based on its determination that Petitioner's validly enacted building code was void." Although reference is made therein to "substantive due process," the discussion thereunder with respect to the right of a fair and impartial hearing and the right to confront and cross-examine witnesses, to appear with counsel, etc., appear to be directed to the issue of *procedural* due process. Parenthetically, it might be noted that – although not relevant to the issue of either procedural or substantive "due process" – the Ohio Supreme Court did not hold that any of Eastlake's building code was "void." To the contrary, it held that although "local authorities may impose higher standards consistent with local ordinances" as to buildings "not using factory produced modules as the basic unit of construction," such higher standards under local ordinances may not be imposed on industrialized units, it being "the legislative intent to encourage use of this type of consturction throughout Ohio." (Pet., P. A6)

I. PETITIONERS CITY OF EASTLAKE AND ITS BUILDING DEPARTMENT ARE NOT PERSONS WITHIN THE PURVIEW OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

With respect at least to the exercise of governmental authority a municipal corporation has no privileges or immunities under the Federal Constitution which it may invoke in opposition to a statute of the State, **City of Pawhuska v. Pauhuska Oil and Gas Co.**, 250 U.S. 394 (1919); **City of Trenton v. State of New Jersey**, 262

U.S. 182 (1923); **Risty v. Chicago, Rock Island and Pac. Ry. Co.**, 270 U.S. 378 (1929); and **Williams v. Mayor and City Council of Baltimore**, 289 U.S. 36 (1933).

Under this Court's holdings in these cases, a municipality is not a "person" under the Fourteenth Amendment; nor is a municipality a "person" within the purview of the Fifth Amendment. As stated by this Court in **South Carolina v. Katzenbach**, 383 U.S. 301, 323 (1966), "the word person in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." The same rationale would necessarily encompass a political subdivision of a state, in this case a municipal corporation.

II. THE FEDERAL CONSTITUTIONAL ISSUES PETITIONERS SEEK TO RAISE ARE NOT PROPERLY BEFORE THIS COURT.

A. THE OHIO SUPREME COURT DECIDED NO QUESTION OF FEDERAL LAW.

Obviously, questions pertaining to the limits of "homerule" under Article XVIII, Section 3, of the Ohio Constitution and to the "intention" of the Ohio General Assembly in providing, in effect, for the licensing of manufacturers of "industrialized units" by the Ohio Board of Building Standards, are distinctly non-federal questions. As will be noted from an examination of the opinion of the Ohio Supreme Court herein, that court did not decide – and in fact was never asked to decide – the "validity" of Section 3781.10(E)(6) or of any state

statute "on the ground of its being repugnant to the Constitution, treaties or laws of the United States" within the purview of 28 U.S.C. 1257(3). Moreover, no claim has been made that Eastlake possesses any "title, right, privilege or immunity. . .under the Constitution, treaties, or statutes of. . .the United States" within the purview of this same statute. Even if such claim had been made, it obviously would be without merit.

Since the opinion of the Ohio Supreme Court does not involve a situation where the "validity" of a state statute was "drawn in question" on the ground of repugnancy to the Constitution, treaties or laws of the United States and since no title, right, privilege or immunity has been "specifically set up or claimed" by petitioners thereunder, we would submit that this Court lacks jurisdiction herein under the provisions of 28 U.S.C., Section 1257(3).

B. PETITIONERS HAVE FAILED TO DEMONSTRATE ANY OF THE CONSIDERATIONS SET FORTH IN RULE 17 OF THE RULES OF THIS COURT WHICH WARRANT REVIEW BY THIS COURT.

The provisions of Rule 17 of the Rules of this Court, as amended in 1980, clearly indicate the considerations governing review on certiorari. Obviously, the Ohio Supreme Court has *not "decided* a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals," within the purview of paragraph (b); nor has any state court herein *"decided* an important question of federal law which has not been, but should be, settled by this court" or *"decided* a federal question in a way in conflict with applicable decisions of this Court," within the purview of paragraph (c). It is clear that the Supreme Court of Ohio has not *decided* any federal question in this case.

C. PETITIONERS HAVE FAILED BOTH TO RAISE IN STATE COURT THE FEDERAL ISSUES NOW ASSERTED AND TO DEMONSTRATE TO THIS COURT, AS REQUIRED BY RULE 21(1)(h) OF THE RULES OF THIS COURT, THAT THESE ISSUES WERE SO RAISED.

Petitioners have the burden of showing that the federal question here sought to be reviewed was adequately raised in the state courts. **Street v. New York,** 394 U.S. 576 (1969). Rule 21(1)(h) of this Court's 1980 Rules provides specifically the manner in which such burden must be met in the petition for certiorari. No attempt has been made herein to comply with the requirements of such Rule. As indicated at p. 4 of the petition, the opinions of the three state courts were based upon a determination of "legislative intent." Even assuming that a federal issue was actually presented to the state courts (in fact, it was not), petitioners concede that the Supreme Court of Ohio" failed to consider the constitutional issue in regard to due process of law." (Pet. p. 4). As stated by this Court, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want or proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." **Street v. New York,** *supra,* at p. 582. Here, no such affirmative showing has or could be made. The issue was not raised before the Ohio courts and cannot be decided at this stage of the proceedings by this Court. **Cardinale v. Louisiana,** 394 U.S. 437 (1969).

III. THE RECORD DEMONSTRATES THAT PETITIONERS WERE AFFORDED DUE PROCESS OF LAW, EVEN HAD THE CLAIMS NOW RAISED BEEN PROPERLY RAISED IN STATE

COURTS BY A PERSON WITHIN THE PURVIEW OF THE FIFTH AND FOURTEENTH AMENDMENTS, SINCE PETITIONERS HAD, AND AVAILED THEMSELVES OF, THE RIGHT TO NOTICE, COUNSEL, PARTICIPATION IN AN EVIDENTIARY HEARING, AND JUDICIAL REVIEW.

The claims advanced herein by petitioners as to lack of due process, both "substantive" and "procedural," are totally without merit in any event. The cases cited in support thereof to the effect that due process requires at least an opportunity to be "heard" can have no possible application herein since, as noted in the opinion of the Ohio Supreme Court (p. A5), hearings were conducted on August 18 and September 19, 1978, in which "Eastlake had an opportunity to present evidence showing why it should not be decertified." The only claims with respect thereto advanced in the Ohio Supreme Court were to the effect that "the final order decertifying Eastlake took the form of a *rule*" and thus failed to comply with the "adjudicatory hearing" provisions of the Ohio Administrative Procedure Act. (See Ohio Supreme Court Opinion, p. A5). Thus, even if the requirements of "procedural due process" under the federal constitution were applicable herein, Eastlake has been accorded such "due process," both by virtue of its right to appear with counsel and to present evidence at the hearings before the Board and its right to appeal the order of the Board to the Common Pleas Court of Franklin County, Ohio, and thence to the Ohio Court of Appeals, and finally to the Ohio Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular U.S. mail to Theodore Klammer, Mastrangelo, Freda, & Klammer, 35100 Euclid Avenue, Willoughby, Ohio 44094 on this _____ day of October, 1981.

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